United States Court of Appeals for the Second Circuit



INTERVENOR'S BRIEF

76-4046

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28, AFL-CIO

and

CARRIER AIR CONDITIONING COMPANY, A DIVISION OF CARRIER CORPORATION

and

THREE BORO SHEET METAL AND VENTILATING CO., INC.

Party to the Contract

and

SHEET METAL AND AIR CONDITIONING CONTRACTORS NATIONAL ASSOCIATION, NEW YORK CITY CHAPTER, INC.

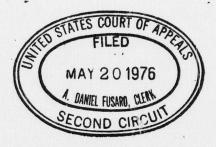
Intervenor.

Case No. 2-CC-1296

Case No. 2-CE-66

B P/s

RESPONDENT'S MEMORANDUM OF LAW IN SUPPORT OF EXCEPTIONS TO DECISION OF ADMINISTRATIVE LAW JUDGE



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I. PRELIMINARY STATEMENT

Following formal hearings held on March 10 through 14 and April 15, 1975, Administrative Law Judge James V.

Constantine (ALJ), by decision dated July 17, 1975, found that Respondent Sheet Metal Workers' International Association,

Local Union No. 28 ("Respondent" or "Local 28") had engaged in certain conduct violative of the National Labor Relations Act, as amended (the "Act"). The specific violations found by the ALJ are:

- 1. §8(e) and §§8(b)(4)(i) and (ii)(B), in connection with alleged activity directed at Three Boro Sheet Metal & Ventilating Co., Inc. ("Three Boro"), the object of which was to force a cessation of business between Three Boro and Carrier Corporation ("Carrier") on the "Van Etten" jobsite;
- 2. §8(e) in connection with alleged activity directed at General Sheet Metal, Inc. ("General"), the object of which was to force a cessation of business between General and Carrier on the "Babies Hospital" jobsite; and
- 3. §8(b)(4)(ii)(B) in connection with certain statements made by Respondent's agents to representatives of Carrier demonstrating the former's opposition to introduction of the Carrier moduline units in New York City.

Respondent now files its Exceptions and supporting brief to the findings of fact, including credibility resolutions, and the conclusions of law made by the ALJ. The Exceptions appear as Appendix A hereto.

II. STATEMENT OF FACTS

A. The Background of the Dispute

The crux of the instant dispute is a component of a central air-conditioning system known as a plenum. With no hint of oversimplification, a plenum is a simple, four-sided box made of sheet metal which serves a variety of purposes including the housing or receipt of air and noise abatement. Throughout the entire period spanning the memory of all participants and witnesses in this proceeding, Local 28 has claimed work jurisdiction and has actually performed, exclusively, the fabrication of plenums, their assembly or attachment to other components of the system, and their actual installation in the New York City area. And while it is true that there may be some minor variations in plenums from system to system, they have always been simple, four-sided metal boxes which, traditionally, have been fabricated, assembled, and installed by members of Local 28 (T.R. 156-57, 159, 160, 306-07, 315, 355, 365-66, 668-69, 711, 713-14, 744 and 910).1

¹ T.R. refers to pages of the Official Transcript Report.

Approximately ten years ago Carrier developed an allegedly new air-conditioning unit called a "variable volume muduline unit" in several different forms, the 37A and 37P models. (G.C. Ex. 7, 10A and 10B). The uniqueness of this system in relation to both pre-existing ones and to other innovative systems designed by other manufacturers is not relevant herein. Rather, all that must be noted is that the multitude of patents filed by Carrier covering these new units all relate to components other than plenums (T.R. 145-49, 152). The one element which was not revoluntionary, which existed in the same form as in other "outmoded" units (save for differences in size, etc.), which was for all intents and purposes identical in the processes of fabrication, assembly and installation as pre-existing units, and which was not patentable, was the plenum (T.R. 149, 151-52, 711, 744 and 910). Fabrication, assembly and installation of the plenums for Carrier's units involves substantially the same work as required on both pre-existing units and other manufacturers' versions of the patented "variable volume moduline unit." (T.R. 785).

ments and testimony, including patents, brochures and schematics

[&]quot;G.C. Ex." refers to General Counsel's exhibit in evidence. Respondent's exhibits in evidence are referred to as "R. Ex."; Charging Party's as "C.P. Ex.".

was nothing more than a transparent attempt to secrete the basic shortcomings in General Counsel's case behind a facade of unnecessary, technical expectorations. The purpose, clearly, was to proffer the unit as a completely "new" item when, in fact, the plenum component is anything but that.³

However, it is not necessary to unduly burden this presentation with citations to evidentiary material relating to either the absence of innovation in the plenums used in the new units or Respondent's claim to the work of fabrication, assembly and installation, for Carrier has expressly recognized same through its actions vis-a-vis Local 28 over the last 10 years. Thus, when Carrier initially set out to market its new units in New York City in 1966, and before it obtained one single order, its chief area representative sought out Local 28 and requested that it surrender the work of fabricating and assembling plenums, retaining only the work of installing them as part of the entire, completed unit (T.R. 74-87, 161-63).

As will be discussed, <u>infra</u>, III-Point 4, this tactic, along with Carrier's claim of both economic and operational problems in fabricating the plenums in New York was improperly relied on by the AJL to conclude that Respondent had no claim to this work.

⁴ Of course, the installation of the plenums, as an assembled component of the system, always remained the work of Local 28 members. Only the fabrication of the plenum and its attachment to the unit is in dispute.

Respondent, quite naturally, declined this request and insisted that since its members had traditionally done the work of fabricating, assembling and installing plenums on all central air-conditioning units, old or new, patented or otherwise, it insisted that this work jurisdiction not be eroded and opposed use of the new Carrier units (or, for that matter, any prefabricated units, i.e., plenums already attached) in its jurisdiction.

Having failed to obtain this concession from Respondent, Carrier filed no unfair labor practice charges or lawsuits of any kind. Rather, it offered to redesign the unit so as to eliminate the prefabricated plenums and thus allow manufacture and assembly to be done in New York by members of Local 28 (T.R. 89-90, 92-94, 166, 167, 200-10, G.C. Ex. 2, App. G).

The record reveals the existence of two jobs in

New York City in which Carrier shipped its new unit without

plenums. The "Police Building" job in which members of Local

28 employed by Triangle Sheet Metal Co. Inc. ("Triangle")

fabricated and assembled the plenums and the "Staten Island"

job in which Respondent's members employed by Essex Sheet

Metal Works ("Essex") performed this work (T.R. 166-67, 200-10,

G.C. Ex. 2, App. G). And while Carrier claimed, and the ALJ

found (J.D. 7, 22), that Triangle's employees could not

properly fabricate the plenums resulting in Carrier having to pay \$100,000 in additional costs, to the extent that this is at all relevant, the fault was Carrier's in supplying defective specifications. Thus, the record conclusively shows that Carrier, in recognition that it, not Triangle, was at fault, not only paid Triangle for the defective plenums manufactured, but paid it an additional \$10,000 to correct the errors. In fact, Carrier has admitted sole responsibility for these defective plenums (See R. Ex. 4, 5, 6, 7 and 8).

No such claim of incompetence was made as to the "Staten Island" job and thus, it is apparent that members of Local 28 were indeed competent to perform the work.

Thereafter, Carrier tried another method of inducing Respondent to surrender its claim of work preservation in relation to the plenums; it attempted to redesign the new unit complete with plenums but in such a way as to require substantially more installation time than the original new unit (T.R. 684-85, G.C. Ex. 26). Carrier thought that if the man-hours of Local 28 members in installing the completely fabricated units were greater than the man-hours in manufacturing, attaching and installing the first versions of

Had the error been Triangle's rather than Carrier's, one would expect that the latter would not only refuse to pay the former but would contract with a different shop for the correct work rather than pay \$10,000 to Triangle to redo it.

the new moduline unit, Local 28 should yield its rights.

Once again, Carrier filed no charges with the Board or with any other forum. Indeed, given this undisputed fact, one must seriously question the bona fides of any contention that the work in question is not claimable by Respondent, for it would seem that redesignating the unit to create make-work for Local 28 members, thereby intentionally and artificially raising the price of the unit installed, is a most extreme step which would not be undertaken unless Carrier was at least as sure of the validity of Respondent's claim as the latter was.

Having been totally unsuccessful in inducing Respondent to forego its claim to the work, Carrier agreed to cease and desist from attempting to market the new units in New York City until a satisfactory resolution was reached with Local 28 (T.R. 684-85, G.C. Ex. 6, App. U).

Subsequently, and entirely in keeping with Carrier's recognition of the validity of Respondent's contentions in connection with the plenum work, Carrier engaged in the following acts:

- 1. Agreed to withdraw the instant unfair labor practice charges in return for Local 28 foregoing its contractual rights against a breaching subcontractor (T.R. 684-85, and G.C. Ex. 6, App. U);
- 2. One of the highest officials of Carrier attempted to invoke the aid of the President of the Sheet Metal Workers' International Association in prevailing upon Local 28 to forego its work rights in relation to the plenums (G.C. Ex. 2, App. H rejected); 6 and
- 3. Encouraged and participated in, if not initiated, studies and recommendations of the employer-dominated Joint Industry Committee to the effect that Local 28 should forego its traditional work in return for expectations of new, increased work, arising out of use of the Carrier units (T.R. 208-11).

Throughout this entire history spanning a decade of maneuvers, inducements and enticements, all designed to prevail upon Respondent to surrender its rightful work, Carrier never once took any action or uttered any expression of opinion that the fabrication and assembly of plenums for its new moduline

While Respondent, at the hearing, objected and continues to object to the introduction of this Exhibit on the grounds that it is self-serving, immaterial and incompetent, the very fact that it was written at all shows tacit recognition of the rights of Local 28 and an attempt to circumvent them through pressure applied by a higher authority.

units was not, traditionally and historically, the work of members of Local 28. Only now, in the instant proceeding, is Carrier heard to claim that the plenum component of its variable volume unit is a new product and that Local 28 has not traditionally claimed work relating to plenums. The aforementioned actions of Carrier, however, occurring over a 10-year period and continuing to date, even while these proceeding. The pending, speak louder and truer than the newly conceived contentions. Indeed, the record amply demonstrates that Carrier's new-found claims are based on other considerations totally irrelevant to an analysis of work preservation or uniqueness of its new units, to wit, the cost of fabrication in New York (T.R. 167, 179-80, 182) and Carrier's desire to "no longer be involved in plenums made in New York" (T.R. 179-80).

The transparency of Carrier's claim is further demonstrated by the fact that General Counsel, in its brief to the ALJ, did not contest Respondent's right to the work in question.

Based on the foregoing, it is clear beyond peradventure:

1. That the work of fabricating, assembling and installing plenums in New York City has historically, traditionally, and customarily been done by members of Local 28; and

2. That the fabrication, assembly and installation of the plenum components of Carrier's variable volume moduline units involve exactly the same work and skills as required for plenums of pre-existing units and variable volume moduline units of other manufacturers, all of which members of Local 28 are qualified to perform as demonstrated by the fact that they have, in fact, done so in the past (T.R. 177, 200-10, 711, 713-14, 744, 751-52 and 910).

B. The Background History The ALJ's Findings.

The ALJ made certain observations and findings with respect to the foregoing history of the instant dispute. To the extent that they are relevant at all, Respondent respectfully submits that they are incorrect and unsupported by the record evidence. These findings are:

- 1. That the Carrier moduline units including the plenums, were new and different units covered by patents (J.D. 11, 21, 22);
- 2. That in the past "hundreds of thousands" of the new Carrier units were installed in prefabricated form by members of Local 28 without objection (J.D. 7);

- 3. That Carrier could not market its new units in New York because it was too costly to have members of Local 28 fabricate and assemble the plenums because these individuals were incompetent to do so (J.D. 7, 22); and
- 4. That members of Local 28 would not lose any man-hours of work by allowing the redesigned prefabricated Carrier units to be installed (J.D. 23).

With respect to the first finding of fact, all of the record evidence and particularly the exhibits introduced demonstrate that although many patents were obtained on the new moduline units none related to the plenums which were not unique or unusual metal boxes and therefore not patentable.

Not only has the ALJ totally ignored this, but he has also shut his ears to the testimony of three non-party witnesses.

Three employers testified that the plenum, which always varies to some extent from unit to unit, is not any more difficult in construction or assembly between the new Carrier units and pre-existing units or other manufacturers' versions of the new moduline unit (T.R. 149, 151-52, 711, 744, 785, 910).

⁷ The ALJ's "credibility resolution" is discussed, <u>infra</u>, II-D.

In addition, conspicuously absent from the AJL's decision is any indication of whether he considered that Local 28 could claim this work as being "of the type" or as "successor" to its existing plenum work in the event that the new units were deemed new and different from existing plenums. After all, the new moduline units were designed to displace the older units just as pre-machined metal doors were the functional successor of wooden doors cut and fitted on the jobsite. Thus, even the ALJ's patently incorrect finding that the plenums on the new units are not the same as the plenums on older units, is fatally insufficient.

However, most erroneous is the very issuance of a finding or the raising of any question that the work in dispute was not, traditionally, the work of members of Local 28. When one notes that neither the General Counsel nor Carrier urged that plenums on the new moduline units were unique or substantially different from those on other units, the entire thrust of Carrier's presentation regarding patents, technical material and problems encountered in marketing was not directed to a contention that the work in question did not belong to Respondent. Rather, this inundation of the record was part of Carrier's pleas that it should be permitted to use

National Woodwork Manufacturers Assn. v. N.L.R.B., 386 U.S. 817 (1967).

prefabricated units based on economies and efficiencies without regard to the rights of Respondent's members. Noting that
Carrier, through its actions over the last ten years as detailed, <u>supra</u>, is estopped from so claiming, the ALJ's finding
herein can only be viewed as clearly erroneous.

The ALJ's second finding of fact, that in the past, "hundreds of thousands" of prefabricated Carrier moduline units have been installed by members of Local 28 without incident is to be gracious, an aberration. For not only is the record totally devoid of any testimony, evidence, suggestion or insinuation supporting this finding, but the parties expressly stipulated to the contrary when they agreed that the new moduline units, including the plenum portion are:

"Installed as fabricated in Carrier's Tyler, Texas factory by members of Locals of the Sheet Metal Workers' International Association without objection except in that area within the jurisdiction of Local 28. Examples of such installments are shown in G.C. Ex. 8 with deletions therein for installments in New York City." (Emphasis added) (J.D. 12).

In the absence of citation to the pages of the official transcript report by the ALJ, Respondent can only speculate as to the origin of this erroneous observation. There was some testimony by a representative of Carrier regarding the fabrication and assembly of induction units by Carrier in Texas and their installment in New York by Local 28. However, these induction units were not the new Carrier moduline units (Models 37A and 37P) which are the subject of the instant litigation. (T.R. 234-35). Perhaps it is this confusion injected into the record by discussion of other types of units that thereafter produced the stipulation quoted above.

The ALJ's third finding of fact, that plenums could not, operationally or economically be manufactured and assembled in New York by members of Local 28 because they were incompetent to do so is not only totally unsupported and contradictory to the record evidence, but is an impertinent and unwarranted denigration of the skills and crafts of Respondent's members. As indicated earlier, pursuant to Carrier's first attempt at resolution with Respondent (producing its new moduline units without the plenums), Local 28 members employed by Triangle fabricated and assembled plenums on the moduline units on the "Police Building" jobsite and those employed by Essex did the same work on the "Staten Island" jobsite. Aside from the initial deficiencies for which Carrier admitted responsibility on the "Police Building" job (R. Exs. 4, 5, 6, 7 and 8), the record shows that neither Carrier, Essex nor Triangle received any complaints about the plenums made by Local 28 members on these two jobs.

Thus, and to whatever extent it is relevant herein, 10
Respondent's members have demonstrated that they are competent

As expressed, <u>infra</u>, III-Point 4, Respondent's view is that the qualifications of its members, efficiencies and economies are all irrelevant, as a matter of law, to consideration of the legal issues raised herein.

to perform the exact work in question and their actual performance of it raises a compelling inference that it was substantially similar, if not identical, to other work on other units which Respondent members perform daily.

The abortive reasoning of the ALJ herein can be no better demonstrated than by reference to his ancillary finding that Respondent has no claim to the subject work because its members performed it only twice before:

"The two times when Local 28 members produced [plenums on the new units] not only fail to rise to the stature of tradition or history but also arose only because Carrier consented thereto as an effort to settle the dispute with Local 28." (J.D. 23).

The implications of this unwarranted statement, in no uncertain terms, are that a union can never claim new work as belonging to it if it has never done it before or has only done it once or twice, or in the context of settling outstanding disputes. Does the ALJ herein purport to overrule National Woodwork, supra?

This truncated analysis appears to be predicated on a complete lack of understanding of the facts, prevailing law and contentions of the parties. Respondent herein does not lay claim to this work on the grounds that it had done it twice before. Its claim is that the work is identical to or "of the type" or "successor" to work it has traditionally done.

Beyond that, Respondent makes no assertion based on the two incidents save that, as expressed, successful completion of the work by its members indicates that the work was not substantially different than that to which its members were accustomed. Noting that the facts and circumstances relating to the two occasions on which Respondent performed the work were placed in the record not by Respondent, but by General Counsel and Carrier as part of the history of the dispute (and the alleged troubles Carrier encountered which it contends made it impossible to produce the units other than through complete fabrication in Texas), the ALJ's cited statement appears even more farfetched and unsupportable.

Yet a further example of the ALJ's tortured reasoning, resort to non sequitur and total disregard of the facts, the law and the contentions of the parties is evident from another of the ancillary findings made in connection herewith. Specifically, in discussing the construction industry proviso to \$8(e), the ALJ found the proviso inapplicable:

"because the disputed work, i.e., the plenums, was done off the jobsite at the plant of [Carrier] in another State." (J.D. 22).

Initially, the foregoing statement is no more than a simplistic bootstrap argument, for if work were done on the

jobsite there would be no dispute. It is only when the work is done off the jobsite and there is a claim that it should be done on the jobsite must one consider the proviso to §8(e). In the instant matter, Respondent makes no such claim. It readily admits that the work of fabrication and assembly of plenums (as compared to installation which is not in dispute here) is done off the jobsite, traditionally, in the shops of sheet metal contractors employing members of Local 28. One would have presumed that after five days of hearings and a record of almost a thousand pages, the ALJ would have understood that Respondent's claim to the work of fabricating and assembling plenums on the Carrier moduline units was predicated on the doctrine of work preservation which is separate and distinct from any claim of §8(e) proviso protection.

C. The Instant Dispute - The "Van Etten" Jobsite

Moving from the background history to the events within the time reference of General Counsel's complaint, in 1973, Carrier, unsuccessful in obtaining a waiver of the work jurisdiction from Local 28, renewed attempts, contrary to agreement, to solicit orders for prefabricated moduline units within Respondent's jurisdiction, New York City. Carrier continued to manufacture completed units, with plenums attached,

in its Tyler, Texas plant using its employees represented by one of Respondent's sister unions, another local of the Sheet Metal Workers' International Association.

In the spring of 1973, the Industry Committee's recommendations favorable to Carrier's desires were presented to Respondent. In May and June of that year, Local 28's Executive Board recommended to its membership, contrary to the Committee's suggestion, that they refuse to grant any concessions to Carrier with respect to its moduline units and they continue to oppose jobsite installation of those units in New York if they arrived prefabricated. Subsequent to the membership's adoption by vote of the recommendation of its Executive Board, Carrier inquired and was advised of the members' decision.

Occurring contemporaneously with the above were the events of the "Van Etten" jobsite which gave rise to the instant charge. In about April of that year, the Einstein Medical School let a contract to an architectural firm (Isadore and Zachary Rosenfield) for this job. The architects engaged consulting engineers (Hankins & Anderson) and thereafter let a contract to the Ormar Building Corporation as general contractor, who, in turn, retained Acme, a heating, ventilating and air-conditioning contractor (G.C. Ex. 2, App. N, O, Q and R).

While the architect, the consulting engineers and Ormar specified use of Carrier variable volume moduline units, none of them specified, nor did it make any difference to them, whether the units were purchased from Carrier complete with plenums attached or purchased with the fabrication of plenums and assembly to be done locally (T.R. 157-60, G.C. Ex. 2, App. P, Q and R). Thus, it appears that at the time that Ormar awarded the contract to Acme, the latter was given the choice with regard to the method of furnishing plenums.

Acme then entered into oral negotiations with Three Boro as air-conditioning subcontractor. The record is totally barren as to the dates, frequency and substance of these oral discussions and, in fact, the only thing which can be definitively determined is that these discussions transpired sometime prior to October 8, 1973, the date of Three Boro's letter to Acme, confirming what the former understood to be the terms of the subcontract (G.C. Ex. 2, App. T-1). As is apparent, the text of these oral discussions is of substantial importance in determining whether Three Boro had any right to determine the source of the plenums.

Local 28 respectfully submits that quite possibly during these discussions Three Boro, cognizant of its contractual commitments to Local 28 (G.C. Ex. 2, App. E), advised

Acme that it would not perform the installation of plenums, if they were to be produced and assembled by Carrier. 11

Equally possible is that again, aware of its contractual commitments, Three Boro "negotiated" with Acme to relieve itself of the right of control, so that the decision to purchase plenums would be solely that of Acme. 12 Yet a third possibility is that Acme, with no urging from Three Boro, unilaterally determined that the plenums were to be purchased from Carrier and sought only to have Three Boro install the completed unit.

An analysis of subsequent events serves to reduce the number of real possibilities. Three Boro's letter to Acme of October 8, confirming oral agreements refers, in the first paragraph, to the "specifications and mechanical drawings... prepared by [consulting engineers]." As these specifications, concededly, do not mandate the source of supply of plenums, and as that letter makes no reference to

It requires no citation of authority to show that if Three Boro did this without any urging, recommendation or reaffirmation of the contract clauses relating to work preservation, but merely because of its desire to adhere to its obligations, no violation is established against Respondent herein.

As clearly demonstrated, <u>infra</u>, III-Point 4, if this were the case, without any reference to the present right of control, Three Boro would not be a neutral, "unoffending employer" in the dispute.

any additional specifications, drawings or requirements superimposed by Acme, one is compelled to conclude that the choice as to the source of the plenums passed, unaltered, through the chain of contracts to the firm that had ultimate responsibility for their installation, Three Boro.

Of the three aforementioned possibilities, it would seem that the least likely is the third, that Acme unilaterally designated that the plenums were to be purchased, when neither the general contractor, the consulting engineer, the architect or the owner saw fit to do so.

The third possibility is rendered even more unlikely through examination of the remainder of the October 8 letter.

In the second paragraph thereof, Three Boro states its agreement to "furnish and install" various items including plenums. 13

The third paragraph of the letter commences with Three Boro's agreement to "install only (furnished by others)" certain items, not including the plenums for the Carrier units.

In the fourth paragraph, Three Boro takes "exception" to certain aspects of the verbal understandings, including installation of "plenums for Carrier units." The words, "take

As is apparent from a reading of the entire letter, the plenums referred to in paragraph 2 cannot be the plenums for the Carrier variable volume moduline unit, but rather, must refer to other plenums.

exception" obviously signify disagreement as is apparent from the rest of that paragraph, noting particularly, the request (by Acme) for hold-harmless insurance and bonds. Thus, from the letter of October 8, one would have to surmise that there was no meeting of the minds between Acme and Three Boro, particularly as to all of the items in paragraph 4 including the plenums for Carrier units. If Acme had proposed and Three Boro had agreed that the latter would only install the Carrier units with plenums already attached, reference to them would have been specifically included under paragraph 3 of the letter, "install only."

The record does not reveal how these disagreements were resolved but, rather, one finds only the product of what must have been significant oral negotiations, a formal agreement between Acme and Three Boro dated December 6, 1973 (G.C. Ex. 2, App. T). Article 2 thereof requires Acme to "furnish and install duct work (presumably including plenums for Carrier units) as per plans and specifications (presumably the original plans and specifications of the consulting engineer which did not indicate whence the plenums were to come), and as per your quotation dated October 8, 1973."

Were inquiry to end here, one would be compelled to conclude that the oral discussions between October 8 and

December 6 produced an agreement that Acme would accept Three Boro's exceptions contained in the fourth paragraph of the October 8 letter and would either look to a different subcontractor to install the Carrier units or would agree that Three Boro would fabricate and assemble the plenums and install the finished units. As the record is devoid of any evidence indicating the presence of another subcontractor retained by Acme to install prefabricated units, one is required to conclude that the latter alternative is, in reality, what happened.

Apparently, Three Boro reached the same conclusion for it refused delivery of the Carrier units when it saw they were completely assembled, including plenums. Three Boro, finding that the units were not in conformity with its view of the December 6th contract, wrote to Acme by letter dated February 21, 1974 (G.C. Ex. 17) in which it expressed its surprise. Note particularly the third and fourth paragraphs of the February 21 letter.

Based on the foregoing, it is respectfully submitted that the inference most properly to be drawn is that
Three Boro retained the right under the December 6 contract
to furnish and assemble plenums for the Carrier units from

whatever source it decided or, at a minimum, it was a joint decision of Three Boro and Acme arrived at through the oral discussions prior to October 8 and the oral discussions between October 8 and December 6, 1973.

The third previously mentioned possibility, that

Acme unilaterally determined, to the complete exclusion of

Three Boro, the source of the plenums, is most remote. Moreover, it is submitted that the rules of evidence require the

Board to do what ALJ did not draw the inference or inferences
which are most adverse to General Counsel's case because of the
latter's failure to produce witnesses from Acme or Three Boro
or, alternatively, to explain said failure.

In this regard, it should be further noted that

General Counsel alleges Three Boro to be a neutral or secondary
employer and an object of (ii) conduct. Thus, failure to produce an individual from that firm must, as a matter of law,
operates to require an inference that the missing testimony,
particularly as to the oral conversations, would be detrimental to General Counsel's case, and specifically, would
demonstrate that Three Boro was not a neutral, unoffending
employer, lacking, at any time, control over the source from
which the plenums were to be furnished.

The propriety of drawing this adverse inference is intensified by the fact that General Counsel did subpoena a principal of Acme, Mr. Reyes, but then very carefully avoided any inquiry into the areas upon which we can only speculate.

From the foregoing, it is readily apparent that the record evidence does not demonstrate that Three Boro had no choice but was required to use Carrier prefabricated units. Further, even assuming Three Boro had no such choice the record evidence shows that it did not arrive in that posture completely involuntarily.

The last "occurrence" relevant to the "Van Etten" jobsite is an allegation that on or about October 18, 1973, approximately 10 days after Three Boro's first letter to Acme in which it excludes installation of prefabricated Carrier units (G.C. Ex. 2, App. T-1), Johansmeyer, a sketcher employed by Three Boro and a member of Local 28 allegedly erased his blueprint drawings made in connection with the proposed installation of the prefabricated Carrier units. For some unexplained reason, neither General Counsel nor Carrier called either Johansmeyer or his supervisor from 14 Instead, General Counsel called

This failure, accompanied by the absence or explanation therefor should have, <u>per se</u>, resulted in the drawing of inferences adverse to General Counsel's case.

as a witness, Reyes, a manager of Acme and, obviously, an interested party whose desires are coextensive with Carrier's.

Over the strenuous objections of Respondent, Reyes testified that Johansmeyer told him that he had "erased" modulines from the sketch, that is, from the tracing (T.R. 72). No other direct evidence was introduced to show what was said, whether Johansmeyer made the sketch initially, whether he erased it, and, if so, why and by whose direction. Nor was any evidence introduced to show that Johansmeyer was at the Union meetings in May and June of 1973 in which Respondent's membership voted to continue to oppose new Carrier units, which meetings, General Counsel alleged, were in and of themselves, conduct prohibited by subparagraph (i) of \$8(b)(4).

Respondent vigorously urged the inadmissibility of the testimony of Reyes on the grounds that it was hearsay and that absent a proper foundation, to wit, that Johansmeyer was an official, a representative or an agent of Respondent, whatever he said could not be binding on the Union. Initially, Respondent was successful and the ALJ sustained the objection, whereupon counsel for the General Counsel proceeded to an offer of proof (T.R. 470). At the conclusion of the offer of proof the ALJ stated "I adhere to my ruling (sustaining Respondent's

objection)" (T.R. 470). Thereafter, the witness blurted out at a time when there was no question pending before him, the sum and substance of the conversation which had just been excluded by ALJ. The relevant part of the official transcript shows:

- "Q (By Mr. Green) Do you know who was the one who was to make the tracings on these sketches?
- A I assume it was Ted.

MR. BOGEN: I ask that that be stricken because the witness has made an assumption.

JUDGE CONSTANTINE: Wait until he finishes the answer. You assume what?

 $\ensuremath{\mathsf{MR}}.$ BOGEN: He assumed it was done by, Your Honor.

THE WITNESS: Right, because he told me.

JUDGE CONSTANTINE: In determining if they were done by Johansmeyer or not, I think he can say what he knows.

THE WITNESS: He said he had erased Modulines from the sketch, that is from the tracing.

So I assumed he had drawn them in." (T.R. 471-72)

One would have expected that the ALJ would have <u>sua</u>

<u>sponte</u>, stricken this spontaneous utterance of the witness

which was not responsive to any question before him, particularly since he had, not thirty seconds earlier, overruled

General Counsel's offer of proof. Yet, miraculously and without explanation the ALJ now accepted the testimony stating:

"JUDGE CONSTANTINE: I will adhere to my ruling that I think it is admissible(?). You have connected it(?) but your rights are saved, you get an automatic exception, Mr. Bogen." [5] (Emphasis added). (T.R. 472)

Lastly, General Counsel attempted to show that Pasquinucci, president of Respondent, admitted to Contardi of Carrier that which neither Carrier, Three Boro nor Acme could testify to, to wit, that Pasquinucci instructed Johansmeyer to erase the moduline sketches. 16

Contardi's testimony on this alleged conversation was that upon learning of the events of the October 18 jobsite meeting, he telephoned Pasquinucci and stated "Dan, I hear there is trouble on the Van Etten job. Dan, I understand that you have refused to let them sketch the job." (T. R. 123).

According to Contardi, Pasquinucci replied "that's so" (T.R. 123).

One cannot help but wonder what ruling the ALJ was adhering to because his last ruling was that this conversation was inadmissible while now he purports to adhere to a ruling that it is admissible. As to the "connection" made, Respondent could not endeavor to speculate as to how the spontaneous answer of the witness showed that he was acting as an agent or representative of Respondent.

One is constrained to note the unusual good fortune of Carrier in obtaining this "evidence". For when one observes the total absence of any other proof that Johansmeyer was directed by anybody from Respondent to cease performing the work in question one cannot help but marvel how Providence blessed Contardi with this "one-on-one" telephone conversation with Pasquinucci in which the latter, a seasoned veteran of labor relations, "spilled the beans". Most amazingly, this was the second time that Carrier was so blessed, the first time being when Johansmeyer allegedly admitted to Reyes that he had been told to erase the sketches. Such good fortune defies all logic and probability.

pasquinucci's testimony was in marked contradiction to the extent that he emphatically denied any knowledge of the October 18 incident or the actions of the sketcher and, therefore, could not have responded affirmatively to Contardi's statement. Pasquinucci's testimony was to the effect that Contardi called and asked him whether he had heard anything about the troubles on the Van Etten job to which Pasquinucci responded negatively. Contardi then inquired as to what he was going to do about it and Pasquinucci replied that he didn't know anything about it and would do nothing, but go by his contract (i.e., that if a member of Respondent refused to do work in violation of the contract, Pasquinucci would not instruct him otherwise) (T.R. 621).

While Respondent suggests that any credibility resolution of the conflicting testimony should have been made against Contardi based, inter alia, on the extreme bad faith demonstrated by Charging Party as more fully set forth in footnote 3, supra, Respondent respectfully submits that a close analysis of the two versions can produce a reconciliation without resort to credibility evaluations.

Contardi's version of the telephone conversation shows that the phrase allegedly used by Pasquinucci to signify, affirmatively, agreement with a statement by Contardi was

"that's so." Thus, that phrase, as used allegedly by

Pasquinucci in Contardi's version was synonymous with more

common expressions of agreement like "yes," "yeah," "uh huh,"

"okay." Attribution of the phrase "that's so" to Pasquinucci

appears rather strained, especially so when he testified at

length during the hearing never utilizing such an expression

to indicate agreement, but rather, relying on the aforementioned more common expressions. In fact, review of the entire

record testimony of Pasquinucci and Contardi strongly suggests

that the phrase, "that's so," is one more likely to be utilized

by the latter as indicative of acquiescence.

However, in attempting to reconcile the two versions it is entirely possible that if Pasquinucci used that phrase, he did so not as a synonym for agreement, rather in an inquisitorial fashion. Thus, the single addition of a question mark after "that's so" in Contardi's testimony, the single change of tone and emphasis placed on these words, would substantially reconcile the conflicting versions and support Respondent's version that Pasquinucci did not instruct nor even know that the sketcher had refused to perform services until Contardi told him so on October 19. Clearly, the utilization of "that's so" in an interrogatory fashion is more probable especially when attributing same to Pasquinucci.

While Respondent would certainly not suggest that Contardi purposefully omitted the interrogatory inflection in Pasquinucci's voice when he said, "that's so," (even though Contardi appeared to be very much aware of the significant and almost determinative nature of the intonation or lack thereof) such a "minor omission" from Contardi's version of the conversation would be totally consistent with his entire testimony (and indeed, all of the testimony and evidence presented by General Counsel and Carrier) which, as expressed earlier, was nothing more than an attempt to ignore ten years of uncontroverted facts and to inundate the record with irrelevant evidence and testimony so as to obfuscate the true facts and issues herein.

Further, the record evidence, taken as a whole, and noting particularly certain undisputed facts, serve to conclusively demonstrate that, as a matter of sheer logic, neither Pasquinucci nor Johansmeyer made the statements attributed to them:

1. At the time Johansmeyer allegedly made the "admission" to Reyes, Johansmeyer's employer, Three Boro had been on record with Acme that it would not install prefabricated Carrier units (G.C. Ex. 2, App. T-1);

- 2. Therefore, it would be inconceivable that Three Boro would have directed Johansmeyer to sketch the installation of units which ten days earlier it stated it would not perform;
- 3. Over a ten-year period including almost half a dozen jobs involving new Carrier units, both before and after the alleged instance relating to the "Van Etten" job, Local 28 never once resorted to a refusal to perform services. On each such occasion, prior to the "Van Etten" job arrangements were worked out without resorting to such activity. And most convincingly, on the "Babies' Hospital" job subsequent to the "Van Etten" job, Respondent again did not resort to this type of activity but merely confined itself to exercising its contract rights against the breaching employer through the contract grievance procedure.

Viewed in this totality of circumstances and events, it is most improbable that the "Van Etten" job was the one exception to Respondent's conduct, the one time in ten years that it resorted to stopping work.

D. The ALJ's Findings of Fact -The "Van Etten" Jobsite

The ALJ made certain observations, findings of fact and credibility resolutions with respect to the events on the "Van Etten" jobsite. To the extent that they are relevant at all Respondent respectfully submits that they are incorrect and unsupported by the record evidence. They are:

- That without discussion, reason or explanation the ALJ uniformly credited General Counsel's witnesses and discredited Respondent's (J.D. 19, 22, 23);
- 2. That Three Boro had no right of choice as to utilization of prefabricated Carrier units because the architect and engineer had specified them (J.D. 24);
- 3. That on or about October 18, 1973 Johansmeyer admitted that pursuant to instructions from
 Respondent he erased the sketchings relating to installation of the new Carrier unit (J.D. 5, 20, 23); and
- 4. That on or about October 19, 1973,

 Pasquinucci admitted to Contardi that he had refused to

 permit sketching for the installation of Carrier moduline

 units on the "Van Etten" job (J.D. 23, 24).

With respect to the credibility resolutions made,
Respondent readily recognizes that such determinations are
predicated on both tangible factors (e.g., inconsistencies,
probabilities derived from experience) as well as intangible
ones (e.g., demeanor, time lapse in answering questions,
facial expressions). However, Respondent is also aware that
in arriving at such resolutions, it is customary to articulate,
or at least refer in passing to the factors relied on. Hence,
Respondent submits that not only are these credibility resolutions incorrect and completely unsupported by the facts, but
they are insufficient, as a matter of law, because of the
total absence of elucidation of the factors relied on. The
sum and substance of the ALJ's credibility resolutions are:

"As hereafter recited I have not credited Respondent's evidence on some aspects of the case" (T. R. 19).

"Crediting the General Counsel's evidence, and not crediting Respondent's evidence to the extent it is not consonant with the General Counsel's. . . "
(T. R. 22).

"In this connection I find, crediting Contardi, that Dan Pasquinucci, the President of Local 28, admitted to Contardi. . . ." (T. R. 23).

Respondent further recognizes that the Board will not normally review and only rarely reverse the credibility resolutions made by the ALJ. However, as has been often stated, mechanical application of a rule is no substitute for analysis

of its genesis and applicability to the issues at hand. When one recalls that the underlying rationale for the rule is that the ALJ is in a better position to observe the intangible factors (demeanor, facial expressions) not reflected in a record, and noting that the ALJ did not purport to rely on any of these factors, the rule is clearly inapplicable. For in a case such as the one at bar, the Board is in as good a position as the ALJ to resolve credibility based on tangible factors fully and accurately reflected in the record such as probabilities and expertise in labor relations.

bility resolutions, Respondent is contrained to comment, at the outset, on the precipitous nature of the determinations. Noting that over six days of hearing approximately eleven witnesses, almost equally divided between General Counsel and Respondent, testified, it is the height of judicial indiscretion to treat conflicts in their testimony by merely saying that I, the ALJ, credit all of General Counsel's witnesses and discredit those presented by Respondent. Moreover, it is respectfully submitted that such a wholesale and expeditious dispensation of justice is, in and of itself, the most compelling evidence of prejudgment.

It is fortunate that there are only two areas of factual disagreement, which, conceivably, require credibility resolutions:

- The alleged admission by Johansmeyer to Reyes; and
- 2. The alleged admission by Pasquinucci to Contardi. 17

Both of the foregoing conversations were, fortuitously, "one-on-one" and to the extent that the Board does not adopt
Respondent's view of inadmissibility of the first, it is
submitted that for all other reasons expressed, supra,
Respondent's witnesses should be credited. Those reasons
are, in sum:

- Three Boro's refusal to do the work on
 October 8;
- 2. The improbability that the alleged admissions were blurted out:
- 3. The adverse inferences required by General Counsel's failure to call as witnesses (or explain that omission) Johansmeyer and a representative of Three Boro or Acme; and

¹⁷ Even these conflicts are, in Respondent's view of the prevailing law, not terribly in need of resolution for, as expressed infra, III-Point 4, even if General Counsel's witnesses were credited Respondent not only had a legal right to do what it allegedly did but had a right to take more extreme measures, e.g., strike against Three Boro.

4. The unlikelihood of such action against
Three Boro in view of a ten-year history both preceding
and subsequent to the incident which is free from
similar incidents.

One cannot help but view the testimony of General Counsel's witnesses, particularly Contardi, as the protestations of a desperate man who, having explored numerous avenues for obtaining his desires only to have been met with resistance at each, became more frustrated with every new defeat.

Contardi's testimony has all the earmarks of the individual employee who believes, often sincerely, that he was the victim of discrimination proscribed by §8(a)(3) but, when faced with the absence of hard evidence recalls that at the time he was fired his employer made passing reference to his Union activities. And although this might be credible with respect to parties who are novices in labor relations, both Carrier and Respondent, both Contardi and Pasquinucci have had much more than a passing familiarity with the Board and the statute it administers.

With respect to the second finding of fact excepted to, and to the extent relevant, that Three Boro had no right

Once again, in Respondent's view of existing law, resolution of this factual determination is irrelevant.

to choose an alternative to the prefabricated Carrier unit, the undisputed record evidence previously cited (the communications between Three Boro and Acme and the inferences to be drawn from the absence of testimony to explain that documentary evidence or to describe their oral communications interspersed therein) clearly shows that this finding was erroneous. addition, Respondent notes that while the ALJ is technically correct in finding that the architect and engineer specified use of Carrier moduline units, neither specified or in fact had any preference as to the fabrication and assembly of the plenums. And while it is clear that the architect and engineer may have been impressed with the patented and innovative aspects of the Carrier moduline units which aspects consume a substantial part of this record, there is no reason to believe that fabrication of the plenums was of any more concern to them than the names of the subcontractor's employees engaged in the installation.

With respect to the third and fourth findings of fact excepted to herein, the "admissions" by Johansmeyer and Pasquinucci, Respondent repeats that the credibility resolutions made in support thereof are incorrect, totally unsupported by the record and deficient, as a matter of law, for failure to articulate the reasons therefor.

E. The Instant Facts and the ALJ's Findings - The "Babies Hospital" Jobsite

The facts with respect to this incident are not in dispute and as they are part of this record through a stipulation of the parties (G.C. Ex. 20) are not subject to credibility resolutions or varying interpretations. Without here repeating the substance of the stipulation, suffice it to say that the subcontractor on this jobsite, General, in violation of its contract with Local 28, installed the Carrier units with plenums prefabricated. Respondent took no action other than to successfully grieve and recover from General damages for the latter's breach of the agreement which damages represent the hours of work lost by members of Local 28. Thereafter, General was reimbursed by Carrier.

At the hearing Respondent objected and continues to object to the introduction of these facts, through stipulation or otherwise, on the grounds that they were not the subject of an unfair labor practice charge or of the complaint in the instant matter. Respondent's objections which were overruled by the ALJ when he received and considered this evidence and issued findings with respect to this incident are discussed infra, III-Point 5.

III. LEGAL ANALYSIS

POINT 1

RESPONDENT HAS NOT VIOLATED §8(e) OF THE ACT WITH RESPECT TO EITHER THE "VAN ETTEN" OR THE "BABIES HOSPITAL" JOBSITES

General Counsel alleged (paragraph 17 of the amended complaint) that Respondent entered into, maintained and enforced an agreement under which Three Boro agreed to cease handling or dealing in the products of other employers, i.e., Carrier. The relevant sections of the agreement are Article I, Section 3, and Addendum II. The first section is a standard declaration of unit work. Addendum II is a prohibition on subcontracting unit work, except within the single multiemployer bargaining unit. On their face, neither clause of the agreement is violative of §8(e) and, indeed, General Counsel's complaint very carefully avoided alleging the making of the agreement itself as a violation, 19 but rather, alleged that certain other conduct claimed to be violative of §8(e). Thus,

¹⁹ See concluding paragraphs of complaint and omission therefrom of reference to this paragraph, 17, as being violative of the Act. This omission was probably because such an allegation, if contained in the complaint, should have been summarily rejected as untimely under §10(b). See, N.L.R.B. v. Local 28, Sheet Metal Workers' International Association, 380 F.2d 827, 65 IRRM 2867 (2d Cir. 1967); Southern California Pipe Trades District Council (Kimstock Division, Tridair Industries, Inc.), 207 NLRB 59, 31 LRRM 1519.

under General Counsel's pleading, one need not have looked to the agreement itself, but only the steps taken, if any, by Local 28 to enforce what it viewed as the meaning and intent of these clauses.

Almost incredibly, and without urging or encouragement from any party, the ALJ ignored the allegations of the complaint and the prohibitions of §10(b). He specifically found that the subject clauses are violative of §8(e) on their face and while Respondent will not devote any further discussion to amplification of this Exception herein, this conclusion of law along with the credibility resolution previously related and other conclusions of the ALJ to be discussed, infra, all serve to establish that the ALJ must have been confusing this case with some other.

Apart from the erroneous consideration of the contract on its face, it is respectfully submitted that Respondent in no way violated §8(e) for exactly the same reasons, expressed, infra, III-Point 4, that require dismissal of the §8(b)(4) allegations. In this regard, it is clear that if Respondent did not, as a matter of law, violate §8(b)(4), a priori, its conduct could not constitute a violation of §8(e).

²⁰ Ibid.

Southern California Pipe Trades District Council (Kimstock Division, Tridair Industries, Inc.), supra.

POINT 2

THE ALL ERRED IN HOLDING THAT RESPONDENT ENGAGED IN INDUCEMENT OR ENCOURAGEMENT PROHIBITED BY SUBPARAGRAPH (i) OF §8(b)(4)

The ALJ concluded that Respondent violated §8(b)(4)
(i)(B) by:

- 1. Inducing or encouraging its members to refuse to perform services through the Union's promulgation in May, 1973, of a resolution to continue to oppose introduction of the Carrier unit in New York City.
- 2. Inducing or encouraging its member,

 Johansmeyer, the sketcher employed by Three Boro, to

 refuse to perform services relating to the Carrier units.

In order to support the finding of violations herein the record evidence must show:

- Acts of inducement or encouragement by
 Local 28; and
- 2. That these acts were for a proscribed object. 22

The lack of a proscribed object is described, <u>infra</u>, III-point 4.

With respect to whether the record shows conduct by Respondent violative of subparagraph (i) of §8(b)(4) in the meeting of May, 1973, Respondent respectfully submits that the ALJ's holding is totally incomprehensible. Respondent knows of no case (and apparently the ALJ doesn't either because he failed to cite any) which stands for the proposition that a resolution not to grant concessions to an employer, presented not as a direction to the union membership but as a proposition on which the membership voted in a free and democratic way within the sanctuary of a union meeting, could ever constitute inducement or encouragement within the meaning of subparagraph (i). Noting again that Respondent's Executive Board merely framed the proposition to be voted on, made a recommendation and then deferred to the wishes of the membership it requires the most distorted, myopic view to find inducement or encouragement. Is the ALJ espousing a new principle of law, to wit, that as each member voted on the question, his vote constituted an act of the union, and additionally, served to induce or encourage his brother member? More importantly, is the ALJ saying that the provisions of §8(c), the provisions of the Landrum-Griffin Act, 29 U.S.C. §401, et seq., the First Amendment to the United States Constitution, and all traditional notions of free speech and association, must yield to subparagraph (i)?

But further speculation cannot be productive particularly in view of the fact that the ALJ did not see fit to set forth either analysis or citation of authority in support of his holding. Rather, he chose to rely on the naked assertions above. Respondent submits that the ALJ ignored ample Board precedent that the resolution passed by the membership in May, 1973 is not inducement or encouragement, as a matter of law, absent a direction by the union to its members to withhold services.

In <u>Plumbers and Pipe Fitters Union (American Boiler</u>
Mfgrs. Assn.), 154 NLRB 314, 59 LRRM 1734, the Board held no

(i) conduct arising out of a union agent's conversation with employees of a neutral employer advising them that piping of boilers was to be done on the jobsite rather than prefabricated and the subsequent threat by these employees to their employer, a neutral, that if prefabricated boilers were delivered to the jobsite there "would be trouble". On the facts herein, whatever direction as to future action came not from Local 28 but from each member who voted to retain the status quo and not grant Carrier concessions. Clearly a union is not responsible

See also, Operating Engineers Local 139 (Fox Valley Suppliers Ass'n), 182 NLRB 72, 74 LRRM 1048, in which the Board held that a union did not engage in "(i) conduct" by asking employees of a neutral employer whether they would support a strike.

under Board law for these acts. 24

With respect to the second incident of conduct proscribed by subparagraph (i), the inducement or encouragement of the sketcher, in order to support the finding herein one would have to credit Contardi's version of Pasquinucci's admission. Absent this, even the acceptance of Reyes' testimony as to Johansmeyer's "admission" would not suffice, as a matter of law, to show (i) conduct of Local 28.

Based on the foregoing Respondent submits that the ALJ erred in concluding that the union engaged in any acts of inducement or encouragement prohibited by subparagraph (i) of §8(b)(4).

See, Electrical Workers I.B.E.W., Local 43 (Executone), 172 NLRB 621, 69 LRRM 1136, in which one of the union members who stopped work was a member of the union's executive board.

Electrical Workers I.B.E.W., Local 43 (Executone), supra.

POINT 3

THE ALJ ERRED IN CONCLUDING THAT RESPONDENT ENGAGED IN ANY COERCION OR RESTRAINT PROHIBITED BY SUB-PARAGRAPH (ii) OF §8(b)(4).

by:

The ALJ held that Respondent violated §8(b)(4)(ii)(B)

- Advising Contardi that Local 28 would not allow Johansmeyer to sketch the "Van Etten" job;
- 2. Advising Carrier on several occasions, including November 1973 and July 1974, that Local 28 would continue to oppose use of the new units and insist on its contract rights with its members' employers; and
- 3. Filing a grievance and successfully resolving same by receiving actual damages from General based upon lost hours of work for breach of its contract with Respondent not to install prefabricated units on the "Babies Hospital" jobsite.

In order to support the finding of these violations, the record evidence must demonstrate:

1. coercion, restraint or threats by Respondent; and

While it would appear that with respect to the incident involving "Babies Hospital", the ALJ found only a violation of §8(e) and not §8(b)(4), Respondent is not entirely certain of that, and accordingly, has elected to consider this incident under §8(b)(4) as well as §8(e), alternative to its position that the entire incident is not subject to examination in this proceeding.

 that said actions were engaged in for a proscribed object.²⁷

Respondent's most persuasive arguments in support of its Exceptions to the foregoing conclusions of law lie in simply examining those conclusions and the total absence of logic, analysis or citation to authority in support of them. With respect to the first Exception above, and assuming that the Board adopts Contardi's view of the conversations in toto, 28 Respondent submits that this conclusion is incorrect, as a matter of well-settled law. The ALJ's determination on this point, including the sum total of all of his reasoning is:

"Crediting Contardi, and not crediting Dan Pasquinucci, I find that the latter informed Contardi in October, 1973, that Dan had refused to allow Local 28 members to sketch the Van Etten Drug Treatment Center job and that Dan would not permit Carrier Moduline units to come into New York. This, I find, constitutes coercion an object of which is to force or require Three Boro to cease doing business with Carrier. The architect and the engineer on this job had decided 'to put Moduline on the job,' and Three Boro as the sheet metal contractor was to install Moduline Units." (J.D. 24).

Even giving full credit to Contardi's version, the instant event may be viewed, in simplistic form, as a mere

²⁷ See, infra, III-Point 4, for discussion of the object.

²⁸ Of course if the Board does not, discussion of this conclusion of law becomes moot.

statement of intent made to a primary employer. In this regard, there is no question that in the usual course of analysis, were one to seek to identify a primary and a secondary employer, the latter would be Three Boro and the former, Carrier. In fact, General Counsel conceded at the hearing that Carrier was the primary employer. (T.R. 646).

Thus, once again, notwithstanding clear precedent to the contary 29 the ALJ has purposefully established a new rule of law, to wit, statements or action directed at a primary employer constitute violations of the Act. Accordingly, it is respectfully submitted that the ALJ committed error as to this conclusion of law.

The second conclusion of law of the ALJ excepted to herein, that Respondent engaged in (ii) conduct by advising Carrier that the former would insist on its right to the work in question, is yet another occasion of the ALJ's lack of clarity of reasoning and lapse of supporting precedent:

[&]quot;...the mere fact that in a single occasion the union informed Austin [the primary]...that it would not let Hudik [the secondary] install the climate control units involved' ...does not constitute sufficient evidence to indicate that impermissible pressure was directed against Austin." Plumbers Local 638 v.

N.L.R.B., F.2d , 89 LRRM 2769 (D.C. Cir., 1975).

The fact that Carrier is a manufacturer and not a general contractor is, of course, of no moment in consideration of its status as a primary. See, Plumbers Local 638 v. N.L.R.B., supra, fn. 25.

"In November, 1973, Dan Pasquinucci told Contardi that Dan insisted that he 'could not permit the [Moduline] unit to come in' to New York. This, too, contravenes the subsection of the Act which is discussed at this point [ii].

"In July, 1974, President Stack of Local 28 informed Contardi that said Union 'was going to insist that [Carrier] go along with the agreement as written,' i.e., 'Local 28's agreement with the Association.' It is my opinion, and I find, that Stack's statement is coercive and is intended to force Carrier to change its methods of manufacturing Moduline units by not making plenums for its Moduline units. It is also coercive as to Three Boro and other Employers in the Association. I find that such statement contravenes the subsection of the Act here under consideration." (J.D. 24).

Briefly reviewing the context of prior events in which these statements were made, including the proposal of the study committee and their recommendation to the Executive Board of Local 28, all of which Carrier was entirely familiar with, it is readily apparent that these conversations, initiated by Contardi, were nothing more than an expression of interest by Carrier, an interested party, and a factual report, in response, to the results of the May meeting.

Without reciting unnecessary detail, it is sufficient to point out that the latter two conversations were nothing more than a restatement of what had been told to Contardi for the past ten years, that Respondent would not waive its contractual rights with regard to the new Carrier units if shipped into New York City with plenums already fabricated

and attached. These statements do not constitute threats, coercion or restraint, but are merely statements of intent by Respondent to preserve its lawful rights, through lawful means against usurpation by Carrier. Such statements have never been found to be violative of the Act when communicated to either primary or secondary employers. 30

Astrodomain Corp. makes it clear that it is the burden of the General Counsel to demonstrate that the statement made by the union includes an intent communicated to the employer to use illegal pressures. There is absolutely no showing of this intent herein and, to the contrary, the record of Respondent's actions demonstrates, at all times, an intent to resort solely to lawful means.

when compared to the statements held not violative of (ii) in <u>Astrodomain Corp.</u> and <u>Norman Contractors</u>, the statements attributed to Respondent herein can, in no way, be viewed as unlawful.

See, e.g., Carpenter's District Council of Houston (Astrodomain Corp.), 202 NLRB 744, 82 LRRM 1697, in which a threat to "apply sanctions" held not to be "(ii) conduct" absent a showing of intent to use unlawful pressures. See also, Teamsters Local 716 (Norman Contractors), 169 NLRB 156, 67 LRRM 1165, in which the union stated to primary and secondary employers that they would have to pay for lost wages. The Board held this not to be a threat because the object could have been accomplished by lawful means and the Board refused to infer an intent to use unlawful ones. Further, the union's statement to a neutral subcontractor to "get right" held ambiguous, non-coercive and not violative of "(ii)" absent a showing of intent to use illegal pressures.

The ALJ's holding that their statements constituted (ii) conduct is also subject to the same deficiencies as the previous one, in that Carrier was, clearly, the primary employer. Indeed, as the Court of Appeals for the District of Columbia recently noted, not only may a union lawfully advise a general contractor (or a manufacturer) that it will refuse to perform services for the subcontractor, the alleged see ndary, but in so doing, it is serving as a surrogate for the subcontractor who should have himself so advised the primary employer. 31

If Respondent could have lawfully advised Carrier that its members would refuse to perform services for Three Boro related to the moduline units, a fortioni, it did not run afoul of of subparagraph (ii) by advising Carrier that Local 28 would oppose installation of the units as violative of its contract.

Lastly, the ALJ's instant determination would, as a practical matter, be absolutely devastating to the cooperative atmosphere for labor relations which is the very cornerstone of the Act. Contardi had frequent and open discussion with representatives of Local 28 over the course of ten years and throughout this time Respondent's representatives were perfectly candid, albeit not accommodating. At no time did Local 28 refuse to fully and honestly advise Contardi of its position,

Plumbers Local 638 v. N.L.R.B., supra, fn. 36.

or refuse to talk to him, or resort to subterfuge of any sort. Respondent's representatives will, no doubt, have many occasions in the future to talk not only to other Carrier representatives, but to other employers as well as in the day-to-day matters of labor relations. Were the Board to adopt the ALJ's finding that Respondent's report to Carrier of the desires of its members is violative of subparagraph (ii), it is certain that neither Carrier nor any other employer could expect such honest and open discussion in the future. Clearly, were this exact same factual pattern to occur next month, Respondent would be well advised, if the ALJ's determination is affirmed, that to avoid violating the Act, it should either refuse to answer Carrier's inquiries or should state: "I refuse to respond because if I did, my response would be violative of the Act".

The third conclusion of law of the ALJ excepted to herein, that Respondent engaged in unlawful conduct by filing a grievance alleging breach of contract, and successfully obtaining actual damages from General for

installation of prefabricated units on the "Babies Hospital" jobsite, 32 is both incorrect, as a matter of law, and, further, is a most blatant denial of due process.

"Another instance of a violation of Section 8(e) of the Act is the Babies Addition to the Columbia Presbyterian Hospital. Here again I find no right of control in the subcontractor, General Sheet Metal, Inc., so that Local 28, with whom it had a contract as a member of the Association, had no lawful right to insist that General fabricate the plennums, [sic] especially since the building owner's specifications called for an installation of Carrier's Moduline Units....

"Also, I find that the charges filed by Local 28 against Ceneral with the Joint Adjustment Board cannot be upheld by Section 8(e) of the Act, since the provisions in the collective-bargaining contract between Local 28 and the Association forbidding subcontracts allowing plennums [sic] to be fabricated outside of New York are not lawful. Cf. Connell Construction Co., Inc. v. Plumbers and Steamfitters Local Union No. 100, decided 6/2/75 by the U.S. Supreme Court, 48 U.S. LawWeek at 4660, 4661; 89 LRRM 2401. In said Connell case, the Supreme Court at p. 4660 held. 'We conclude that Secdion 8(e) does not allow this type of agreement.'" (J.D. 21)

The ALJ's finding herein is:

But this "finding of fact" by the ALJ pales by comparison and, on a relative basis, appears as a petty, harmless oversight compared to his conclusion of law and his total disregard for the concepts of due process.

Unlike every other conclusion of law made by the ALJ, this one was sought to be supported by citation to authority. It is respectfully observed that the ALJ should have adhered to his modus operandi, for the legal precedent that he relied on is simply inapposite.

". . . the provisions in the collective-bargaining contract between Local 28 and the Association forbidding subcontracts allowing plennums [sic] to be fabricated outside of New York are not lawful. Cf. Connell Construction Co., Inc. v. Plumbers and Steam-fitters Local Union No. 100, decided 6/2/75 by the U.S. Supreme Court, 43 U.S. Lawweek at 4660, 4661; 89 LRRM 2401. In said Connell case, the Supreme Court at p. 4660 held. 'We conclude that Section 8(e) does not allow this type of agreement.'" (J.D. 21)

In <u>Connell</u>, the union negotiated an agreement with a general contractor under which the latter agreed not to subcontract work to anyone not having a collective bargaining agreement with the union.

The general contractor did not have any employees who did or in the future would be performing any of the work in question and the contract itself was negotiated and executed in a framework completely extraneous to a collective-

bargaining relationship. This agreement was attacked as a violation of the antitrust laws. The Supreme Court found that the union's purpose in demanding the agreement was to organize the subcontractors, "from the top down", that neither §8(e) nor any other provision of the Act protected this activity, and that, accordingly, the labor exemption to the antitrust laws did not apply as a defense for the union.

Connell is obviously distinguishable from the instant matter in that here the agreement in question: (i) was negotiated in the context of a collective-bargaining relationship; (2) it was with an employer(s) who employs employees who have in fact done the work in question and would continue to do so in the future; and (3) was directed solely to preserving the employees' right to that work.

The ALJ's single sentence quotation, above-cited, from <u>Connell</u>, patently does not support the fact and obviously is entirely out of context. The agreement which the Supreme Court concluded was not permissible by §8(e) was not a nosubcontracting work preservation provision developed in a collective-bargaining relationship, as here, but rather represented an attempt to further union organizational desires

elsewhere. 33 Indeed, were the ALJ looking to the Supreme Court's decision in <u>Connell</u> for guidance in determining this issue rather than in a convoluted attempt to justify what appears to be a prejudgment, he would have found quoted therein the following position of the Board's General Counsel:

"The General Counsel's memorandum in <u>Hagler</u>
Construction is plainly addressed to a different argument - that a subcontracting clause
should be allowed only if there is a pre-existing
collective-bargaining relationship with the
general contractor or if the general contractor
has employees who perform the kind of work covered
by the agreement." (Emphasis in original)³⁴

Thus, completely contrary to the ALJ's view, Connell supports Respondent's, not Carrier's position herein.

The second authority cited by the ALJ in an attempt to support his preordained conclusion is AGC of California,

Inc. v. N.L.R.B., F.2d , 88 LRRM 3542 (9th Cir. 1975).

There, the court held that enforcement of an agreement like the instant one even through lawful means was violative of the Act. But here too, as in Connell, the ALJ's citation of

As noted earlier, Carrier's employees are not only represented by a union, but by a sister local of Respondent. Additionally, Respondent could have no aspirations to displace the current bargaining representative because of Local 28's geographical limitations on its jurisdiction.

^{34 95} S.Ct. 1830, 1839, fn. 10.

authority is somewhat tainted by its conspicuous imcompletion. The remainder of the citation absent from the ALJ's decision would reveal that the Board took the contrary view and that the Circuit reversed. See Southern California Pipe Trades

District Council (Associated General Contractors of California, Inc.), 207 NLRB 58, 84 LRRM 1513.

Interestingly, both counsel for Carrier and General Counsel, acknowledged the existence of this Board decision in their briefs to the ALJ. The ALJ's decision does not.

While Respondent readily concedes that this decision of the Ninth Circuit is in point and would be precedent as to the §8(e) allegation were this matter before that court, it is unclear why the ALJ, adjudicating a case in the City of New York (review of which can only be had before either the Second Circuit Court of Appeals or the District of Columbia Court of Appeals) cited Ninth Circuit precedent. Also, without reason or explanation, the ALJ discarded decisions of the appropriate circuits in favor of binding (on the ALJ) Board decisions (e.g., the "right of control" tests discussed, infra) and at the same time cites a decision

from a stranger circuit, while <u>omitting</u> and refusing to follow the decision by the Board favorable to Respondent.

Rather than viewing the legality of Respondent's actions on the "Babies Hospital" jobsite in light of Connell and the Ninth Circuit decision in AGC v. N.L.R.B., the AJL should have looked to prevailing Board precedent. In both Associated General Contractors of California, Inc., supra, and Kimstock, supra, the union did exactly what Respondent did herein, to wit, pursued its rights under the collective bargaining agreement. In both cases the Board held that the mere enforcement of contract rights, especially in the context of a claim limited to compensatory, actual damages rather than punitive damages, did not constitute (i) conduct or a violation of §8(e) regardless of the object thereof. Although Associated General Contractors was subsequently reversed by the Ninth Circuit Court of Appeals, the Board decisions are, of course, binding on the Administrative Law Judge, his decision notwithstanding.35

It is worthy of note that in <u>Associated General</u>

Contractors the charged union invoked a contractually provided

^{35 &}lt;u>Iowa Beef Packers, Inc.</u>, 144 NLRB 615.

72-hour work stoppage limited to the disputed work which was found by the Board not to be (ii) conduct. If the 72-hour work stoppage is, in the Board's mind, not (ii) conduct, a fortiori, Local 28's claim for compensatory damages without any union-initiated stoppage of performance of the disputed work must be lawful.

Most recently, the District of Columbia Court of Appeals has had occasion to consider this question, and has held that not only may a union lawfully pursue this kind of claim under its contract grievance procedure without violating the Act, but the breaching subcontractor should probably initiate discussion of the payment of damages to the union before or contemporaneous with bidding on work which it knows it is obligated not to perform:

"Of course, it is also true that Hudik-Ross and similar employers could bid on a subcontract specifying prefabricated products and still satisfy a union's work preservation goals, but in this latter situation they would probably be subserved by negotiation of a monetary settlement that would partially compensate the employees for their lost work." 36

³⁶ Plumbers, Local 638 v. N.L.R.B., fn. 26.

From the foregoing, it is readily apparent that the ALJ clearly erred in his legal conclusion with respect to the "Babies Hospital" jobsite. However, the fact that Respondent has addressed itself to the findings of fact and conclusions of law made in connection therewith should not be construed as waiver of its due process argument. The very consideration of these allegations by the ALJ constituted the most flagrant violation of Respondent's basic constitutional right to be apprised of the specific charges against it. Because of the importance of this principle, it is discussed separately, infra, III-Point 5.

Based on the foregoing it is respectfully submitted that the record evidence and prevailing legal precedents establish that Respondent has not engaged in any conduct proscribed by subparagraph (ii) of §8(b)(4).

POINT 4

THE ALJ ERRED IN CONCLUDING THAT RESPONDENT'S ACTIVITIES WERE UNDERTAKEN WITH AN OBJECT PROSCRIBED BY SUBPARAGRAPH (B) OF §8 (b) (4)

Assuming, arguendo, that the Board in some imperceptible way, affirms the asserted "findings of fact" and "conclusions of law" of the ALJ in regard to Respondent's (i) or (ii) conduct, the record and prevailing legal authorities demonstrate the total absence of a proscribed object, i.e., a "(B)" object.

As expressed earlier, the record reflects that over the entire ten-year period that Local 28 and Carrier have been discussing the subject dispute, including the events in question herein, Local 28's sole purpose was to preserve for its members the work of fabricating and assembling plenums. While Respondent urges that this work, when viewed in relation to the new moduline units, is substantially identical to the work performed with regard to plenums on other types of units, it is well-settled law that such is not absolutely essential to a claim of work preservation.

Rather, all that is required is that the work is of the kind or type done previously:

"... the characterization of union activity as having a work preservation objective must therefor depend on whether it is the type of unit work which the employees have traditionally performed, not whether they actually performed the particular work in question." (Emphasis in original.) 37

Further, while Local 28 contends that this is precisely the work reserved to its members by the work preservation clause of the contract, ³⁸ this too, is mot an essential element of Respondent's claim. Rather, the record evidence, establishing as it does that fabrication and assembly of plenums have always been done by Respondent's members in the past, suffices to substantiate a work preservation defense:

"In any event, custom and tradition in the industry must also be looked to in determining the intent of the parties with respect to what work is to be preserved, even in the absence of an explicit work preservation provision. See Local 742, Carpenters v. NLRB, supra note 9, 144 U.S.A.App.D.C. at 24, 444 F.2d at 899." 39

Thus, it is clear that Respondent has established, factually, its claim of work preservation and the legal sufficiency of that claim as a complete and absolute defense herein. Indeed, resort to legal precedent in this regard is

Plumbers, Local 638 v. N.L.R.B., supra, fn. 28. See, also, Retail Store Employees Local 876 (Allied Super Markets, Inc.), 174 NIRB 424, 70 LRRM 1213, in which the Board, in discussing the claimability of new work, stated: "Based on these work practices within the clerk unit, we cannot find the (new) work... so foreign to the unit as to negate the Clerk's assertion of a job protection object... In short, we cannot outlaw primary work protection efforts by such a restrictive definition of unit work."

174 NLRB 424 at 425, aff., 421 F.2d 907, 73 LRRM 2582 (6th Cir. 1970)

³⁸ As stated earlier, Respondent does not concede that the contract is in any way before the Board for purposes of determining it validity, in view of the limitations of §10(b).

³⁹ Plumbers, Local 638 v. N.L.R.B., supra, fn. 28.

superfluous inasmuch as the General Counsel, in his brief to the ALJ, conceded that work preservation is an absolute defense to §8(b)(4)(i)(ii)(B). Notwithstanding that General Counsel does not also concede that work preservation is a complete defense to a charge under §8(e) as well, Associated General Contractors and Kimstock clearly stand for this proposition, as does National Woodwork, supra. Indeed, to hold otherwise would produce the following anomality:

- 1. a union could strike, threaten to strike or take any other action prohibited by subparagraph (i) or (ii) in furtherance of a valid claim to work preservation and not violate §8(b)(4)(B); but
- 2. if that union were to elect to take less severe action, <u>e.g.</u>, grieving the subcontractor's breach of contract, that action would violate §8(e).

The unnatural consequences of this result do not require elucidation.

At the hearing, neither General Counsel nor Carrier ever contested the validity of Local 28's claim of work preservation. Rather, their presentation focused on Carrier's claims:

that without prefabrication of the units
 there would be a loss of efficiencies and economies

and operational and marketing problems;

- 2. that Carrier had attempted to resolve the matter with Respondent by, <u>inter alia</u>, redesigning the subject units to increase the man-hours of installation; and
- 3. that Respondent's alleged unreasonableness in not accepting Carrier's alternative and its steadfast refusal to surrender work.

without resort to extensive discussion, Respondent submits that this is all trrelevant and should have been excluded from the record and/or disregarded by the ALJ:

"And although the dissenters insist that our decision 'increases the costs of construction projects suited to pre-prepared components,' dissenting op. at 59, the National Woodwork Court has instructed us that such 'economic and technological factors * * * are addressed to the wrong branch of government. * * * [Such arguments should be left] for Congress.' 386 U.S. at 644." 41

Without elevating this argument from its irrelevant status, suffice it to say that Carrier's alternative (to increase the installation time while eliminating the fabrication and assembly time) is frought with obvious problems and inequities to union members as well as tainting the continued vitality and enforcement of the work preservation clause vis-à-vis other manufacturers' versions of the moduline units, the pre-existing conventional units and possibly all of the work protected by the agreement.

⁴¹ Plumbers, Local 638 v. N.L.R.B., supra, fn. 38.

Lastly, in view of the work preservation object of Respondent's alleged activity, the next area of consideration is the character of the employer to whom the activity was directed. However, before undertaking that analysis, it is noted that absent the Board's continued adherence to its "right of control" test, in one form or another, inquiry could end here. For, as of this time, there are five Circuit Courts which have rejected this test, and there is no question that under their decisions and the facts of this matter they would refuse to enforce a finding of a violation.

Since the propriety of the "right of control" test has been briefed, argued and analyzed by the Board often enough and eloquently enough, no further disputation will be undertaken herein. Rather, Respondent respectfully submits only that, if the Board is of a mind to take a fresh view of the question, the most recent explication, the opinion of the District of Columbia Court of Appeals in Plumbers, Local 638 v. N.L.R.B., supra, is most well-reasoned and persuasive.

See, Plumbers, Local 638 v. N.L.R.B., supra, 1. 3.

In the event that the Board is prepared to reevaluate this standard, Respondent would press further its request for oral argument.

Turning then to the alternative inquiry at hand, it is clear that even within the framework of the Board's modified "right of control" test, there is no violation herein. In this regard, following rejection of this test, 43 the Board stated that it does not adhere to a mechanical application thereof, but, rather, looks to all of the surrounding circumstances to determine if the employer does not have control, and if not, how he lost it:

"We have studied and shall continue to study not only the situation the neutral employer finds himself in but how he came to be in that situation. And if we find that the employer is not truly an 'unoffending employer' who merits the Act's protections, we shall find no violation."44

^{43 &}lt;u>See</u>, <u>e.g.</u>, <u>Carpenter's Local 742 (J. L. Simmons Co.)</u>, 444 F.2d 894 (CADC, 1973), 76 LRRM 2979, den. enf. of 178 NLRB 251, 72 LRRM 1107; <u>cert. denied</u>, 404 U.S. 986, 78 LRRM 2986.

Plumbers Union (Koch & Sons, Inc.), 201 NLRB 59, at 64, 82 LRRM 1113 at 1119. See, also, Pipe Fitters Local 120 (Mechanical Contractors' Association of Cleveland), 168 NLRB 991, 67 LRRM 1034.

No employer in this proceeding is a "neutral, unoffending employer." Carrier, aside from being the primary employer, is directly involved in the dispute up to its moduline units and is certainly not a neutral. Furthermore, given the questionable and unexplained circumstances surrounding the contractual arrangements between Acme and Three Boro discussed, supra, neither of them could be deemed a neutral. Additionally, with respect to Three Boro (and, to the extent applicable, General), reference to the court's opinion in Plumbers,

Local 638 v. N.L.R.B. demonstrates an uncanny similarity between the acts of the offending subcontractor therein and those in the instant matter. Neither Three Boro here, nor Hudik-Ross there could claim a neutral status even were the Court dealing within the parameters of the rejected test:

"To assert that Hudik-Ross is a neutral bystander innocently caught up in the union's attempts to achieve its objectives by changing Austin's policy of purchasing prefabricated climate control units is to ignore the realities of this labor conflict and the process by which Hudick-Ross was confronted with conflicting contractual commitments. The Hudik-Ross management did not innocently awake one day to find itself in the midst of this dispute. The management had negotiated, presumably in good faith, a collective bargaining agreement which obligated Hudik-Ross to preserve for its employees the work of cutting and threading internal piping on the climate control units which these employees were to install. When the management subsequently executed a contract with Austin which it was fully aware would require its employees to install units on which these employees had not done the internal piping, it could hardly have expected the employees to acquiesce in the blatant violation of their contractual rights." (Citations omitted) 45

⁴⁵ Plumbers, Local 638 v. N.L.R.B., 89 LRRM 2769, 2774.

"Indeed, it is c rious that Hudik-Ross, the 'neutral' that was supposedly injured by being dragged into a 'labor dispute not its own,' did not file the charge of an unfair labor practice; rather, it was filed by the general contractor, Austin." (Citations omitted)

"Hudik-Ross could have totally avoided the labor d spute merely by honoring its bargaining agreement and not bidding on a contract which required it to breach the valid work preservation provision it had negotiated with the union. Thus, to accept the Board's characterization of Hudik-Ross as a neutral bystander under these circumstances would allow the 'Cinderella-like transformation of an obviously involved party,' and would both render nugatory the commitment which Hudik-Ross made and demean the collective bargaining process which is the cornerstone of labor relations in the United States." (Citations omitted)⁴⁷

In summarizing its analysis, the court stated:

"We do not think that an employer who is struck by his own employees for the purpose of requiring him to do what he has lawfully contracted to do to benefit those employees can ever be considered a neutral bystander in a dispute not his own." (Citations omitted)

Finally, the Board should react to the status and situation of Three Boro herein in the manner implicitly suggested by the Court in <u>Plumbers</u>, <u>Local 638</u>:

^{46 &}lt;u>Id</u>. at fn. 23.

⁴⁷ Id. at 2775-76.

^{48 &}lt;u>Id</u>. at 2781.

"And when an employer gets himself into a bind, az did Hudik-Ross, he should arbitrate or negotiate his way out. Having the Board bail him out is to demean the National Labor Relations Act by encouraging deliberate, if not always planned, violations of bargaining agreements." (Citations omitted) 49

Based on the foregoing, it is respectfully submitted that under either the "right of control" test or under the that under either the "right of control" test or under the prevailing precedent rejecting same, Local 28's protection prevailing precedent rejecting same, Local 28's protection of its work from erosion was in no respect violative of the Act.

⁴⁹ Id. at 2779.

POINT 5

1 m 1 169 ...

THE ALJ VIOLATED THE MOST BASIC TENETS OF DUE PROCESS BY ISSUING FIND-INGS AND CONCLUSIONS WITH RESPECT TO THE "BABIES HOSPITAL" JOBSITE

As discussed earlier, 50 in the course of the hearing in this matter, the parties stipulated into evidence certain facts relating to utilization of prefabricated Carrier units on the "Babies Hospital" jobsite and settlement of a grievance against the contractor in an amount equal to the actual man-hours lost by Local 28 members through use of prefabricated plenums. Respondent specifically reserved its rights to object to all of this material on the grounds of relevancy and materiality (T.R. 601-12, et al.). At that time, Respondent strongly urged that these facts which occurred well subsequent to the filing of the charges and issuance of the complaint herein were outside the scope of the complaint.

In its brief to the ALJ, Respondent pressed its objection to these additional facts on several grounds.

If repetition is a form of emphasis, Respondent would repeat these facts ad infinitum for while findings of fact and conclusions of law may be so transparently inaccurate as to raise ancillary questions, nothing offends our traditional notions of fair play and substantial justice as much as the manifest disregard of constitutional protections demonstrated by the ALJ herein.

First, to the extent that "Babies Hospital" facts and circumstances are urged as a separate, unrelated violation of the Act, said issue cannot be considered by the Board, since (1) there is no unfair labor practice charge relating thereto, and (2) the Board's investigatory powers are not self-iniating.

Second, neither the complaint nor the <u>amended</u> complaint in this matter which supersede the unfair labor practice charges that triggered the investigation, allege these additional facts as an unfair labor practice but, rather, were limited to the facts surrounding the "Van Etten" job.

Phird, General Counsel quite clearly took the same position as Respondent: that absent a specific unfair labor practice charge relating to "Babies Hospital" and an investigation by the Regional Director pursuant to said charge, no violation of the Act could be alleged. In this regard, General Counsel's conduct on March 14, 1975, the fifth of six hearing dates, is conclusive. At that time, General Counsel moved to conform the allegations of the complaint to the proofs in certain "minor matters" (i.e., dates of alleged activities) and did not seek to amend the complaint to allege any additional allegation arising out of the "Babies"

Hospital" jobsite. Even when improperly prompted by the ALJ, General Counsel knowingly and consciously refused to move to amend the complaint to add these additional allegations.

General Counsel, in its brief to the ALJ, remained consistent; although the facts of the "Babies Hospital" jobsite were discussed, no argument or request was made for a determination of a violation. Nevertheless, the ALJ, not satisfied with having his invitation to General Counsel to amend the complaint, extended at the hearing, rejected, <u>sua sponte</u>, found a violation. The ALJ, in his decision, very deftly dealt with Respondent's oljections herein - <u>he ignored them</u>.

In his decision, the ALJ neither ruled on Respondent's objections nor mentioned them. It would appear that this omission was intentional, since there can be no other explanation for the ALJ's recitation of the stipulation regarding the "Babies Hospital" job in a manner which suggests that the stipulation was made by all parties without reservation or objection of any kind:

"At the hearing on April 15, 1975 the parties entered into the following written stipulation. See G.C. Ex. 20 (J.D. 18)."

Based upon the foregoing, it is respectfully submitted that the Board reverse the ALJ and refuse to issue findings or conclusions with regard to the "Babies Hospital" job. A determination by the Board that these issues are not properly before it, is more appropriate than a finding that no violation occurred predicated on the authorities cited herein.

IV. CONCIUSION

Based upon all of the foregoing, it is respectfully urged that the complaint herein be dismissed in all respects.

Dated: New York, New York September 4, 1975

Respectfully submitted,

SOL BOGEN
Attorney for Respondent
Sheet Metal Workers'
International Association,
Local Mo. 28, AFL-CIO
One Penn Plaza
New York, New York 10001

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28, AFL-CIO

and

CARRIER AIR CONDITIONING COMPANY, A DIVISION OF CARRIER CORPORATION

and

THREE BORO SHEET METAL AND VENTILATING CO., INC.

Case No. 2-CC-1296

Party to the Contract Case No. 2-CE-66

and

SHEET METAL AND AIR CONDITIONING CONTRACTORS NATIONAL ASSOCIATION, NEW YORK CITY CHAPTER, INC.

Intervenor.

RESPONDENT'S EXCEPTIONS TO DECISION OF THE ADMINSTRATIVE LAW JUDGE

RESPONDENT'S EXCEPTIONS TO DECISION OF THE ADMINISTRATIVE LAW JUDGE

NOW COMES Respondent and hereby files its Exceptions to the findings of fact, conclusions of law and rulings on evidentiary matters made by the Administrative Law Judge.

1. Findings of Fact Excepted To:

- a. That the plenums utilized in connection with the Carrier moduline units were unique, covered by patents and completely unlike plenums used in connection with other units (3.D. 11, 21, 22);
- b. That members of Local 28 had not traditionally and historically done the work in question, and accordingly, that Respondent was attempting to acquire new work rather than preserve existing work (J.D. 21, 22, 23);
- c. That in the past, "hundreds of thousands" of these new units were installed prefabricated by members of Local 28 without objection (J.D. 7);
- d. That members of Local 28 were not qualified to perform the work in question and that on one occasion Carrier had to pay \$10,000 in additional cost for production of plenums because of the incompetence of Local 28 members employed by "riangle Sheet Metal, Inc. (J.D. 7, 22);

- e. That Local 28, by agreeing to install the redesigned new units would, in sum, not lose any man hours of work (J.D. 23);
- f. That Three Boro Sheet Metal & Ventilating Co., Inc. had no control over the identity of the employees who were to fabricate and attach the plenums to the Carrier units because the architect and engineer on the "Van Etten" job specified the Carrier unit (J.D. 24);
- g. That General Sheet Metal Works had no control over the identity of employees who were to fabricate and attach the plenums to the Carrier units because the building owner on the "Babies Hospital" job specified the Carrier unit (J.D. 21);
- h. That in or about October of 1973 Johansmeyer, a member of Local 28 employed by Three Boro as a sketcher, erased diagrams necessary for installation of Carrier units on the "Van Etten" jobsite (J.D. 5);
- i. That in or about October of 1973 Pasquinucci, President of Local 28, directed Johansmeyer to erase the installation blueprints on the "Van Etten" job (J.D. 20); and
- j. That in or about October of 1973 Pasquinucci admitted to Contardi, a representative of Carrier, that he had directed Johansmeyer not to sketch the installation of the Carrier units on the "Van Etten" job (J.D. 20, 23, 24).

2. Conclusions of Law Excepted To:

- a. That the collective bargaining agreement is violative of \$8(e) on its face, notwithstanding that its execution occurred prior to the period of limitations contained in \$10(b) (J.D. 20, 21, 25);
- b. That Local 28's rejection by its members of the recommendation to install prefabricated Carrier units constitutes conduct prohibited by subparagraph (i) of \$8(b)(4) (J.D. 10, 20, 22, 23);
- c. That Local 28's communication to Carrier of its membership's rejection of the recommendation to install prefabricated Carrier units and its statements that it would insist on its contract rights constituted conduct prohibited by subparagraph (ii) of \$8(b)(4) (J.D. 23, 24);
- d. That assuming <u>arguendo</u> Local 28 induced or encouraged its member, the sketcher employed by Three Boro, to refuse to perform services relating to installation of the Carrier units, such conduct is violative of § 8(b)(4)(i)(B) and § 8(e) (J.D. 25).
- e. That Respondent's action in successfully grieving and obtaining an award of damages against General Sheet Metal, Inc. for breaching its contract with Respondent by installing prefabricated Carrier units constituted a violation of \$8(b)(4)(ii)(B) or \$8(c) (J.D. 21);

f. That the Administrative Law Judge's "credibility resolution" is an abuse of discretion and improper as a matter of law. (J.D. 19, 22, 23)

3. Rulings and Evidentiary Matters Excepted To:

- a. The ALJ improperly received into evidence General Counsel's Exhibits 7, 10A, 10B and 2, Appendix II, even though they were irrelevant, immaterial and self-serving;
- b. The ALJ improperly received into evidence testimony relating to uniqueness of the Carrier moduline units, the cost of fabrication in New York, the recommendation of the Industry Commission to permit installation of Carrier units and the rejection by Respondent's membership, the assertion that Respondent's acquiescence in installation of the new units would not deprive its membership of any work and the marketing and operational problems occasioned by fabrication in New York, even though all of the foregoing was irrelevant, immaterial and self-serving (T.R. 167, 179-80, 182, et al.);
- c. The ALJ improperly received into evidence the testimony of Reyes as to a conversation with Johansmeyer even though the testimony was hearsay, incompetent and no proper foundation was laid (T.R. 470-72);
- d. The ALJ improperly failed to draw the required adverse inferences occasioned by General Counsel's failure to call as witnesses Johansmeyer, his superior, and a representative

of Acme Climate Control;

- e. The ALJ erred, as a matter of law, by admitting any facts or contentions relating to the "Babies Hospital" jobsite, none of which was alleged in the complaint (J.D. 12, 18, 19); and
- f. The ALJ, through the conduct of the hearing and issuance of findings and conclusions excepted to herein, when taken as a whole, deprived Respondent of its right to a full, fair and impartial hearing.

Respectfully submitted,

C. Proper

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